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TO: Eminent Domain Subcommittee of the Environmental Quality Council

FROM: Greg Petesch

RE: Additional use of easement acquired through eminent domain

The Subcommittee has requested information concerning whether the holder of an easement acquired by eminent domain may make additional uses of the easement. The Subcommittee has also asked whether additional uses of an easement require additional compensation to the landowner from whom the easement was taken (servient tenement). In order to adequately address this question, some basic discussion of the law governing easements is desirable. The method of acquiring an easement is irrelevant to the determination of whether additional uses may be made and whether compensation is required for the additional uses.

An easement is a grant of the use of and not a grant of title to the land. An easement is a servitude attached to the land. See section 70-17-101, MCA, and Bolinger v. City of Bozeman, 158 Mont. 507, 493 P.2d 1062 (1972). Section 70-17-106, MCA, provides that the extent of a servitude is determined by the terms of the grant or the nature of the enjoyment by which it was acquired. An easement is a "property right" protected by constitutional guarantees against the taking of private property without just compensation. City of Missoula v. Mix, 123 Mont. 365, 214 P.2d 212 (1950).

In Laden v. Atkeson, 112 Mont. 302, 116 P.2d 881 (1941), the Montana Supreme Court defined an easement as a right of one person to use the land of another for a specific purpose or a servitude imposed as a burden upon land. The Court gave the example of an easement in a ditch through another's land. The Court also noted that the right to enter upon the servient tenement

for the purpose of repairing or renewing an artificial structure, constituting an easement, is a secondary easement. A secondary easement is a mere incident of the easement that passes by an express or implied grant or that is acquired by prescription. Therefore the person having an easement in a ditch running through the land of another may go upon the servient tenement and use as much of the land as is required to make necessary repairs and to clean the ditch at reasonable times. A secondary easement lacks the precision of the easement to which it is attached. The Laden court stated, "Omniscient or occult indeed would be the vision of the court that could foresee the precise amounts of land to be needed for repairs and maintenance along the ditches by plaintiffs in the future". Laden at 311. The secondary easement may be exercised only when necessary and in a reasonable manner that does not needlessly increase the burden on the servient tenement. If the holder of an easement exceeds the holder's rights or enters upon or uses the land of the servient tenement for unlawful purposes, the easement holder is guilty of a trespass and the servient tenement owner may maintain an action for trespass. The servient tenement owner is entitled to damages for an abuse of the easement rights.

In Lindley v. Maggert, 198 Mont. 197, 645 P.2d 430 (1982), the owners of a reserved roadway easement sought to enjoin the purchasers of the servient tenement from interfering with the use of the easement. The easement was an easement in gross, not attached to the land, as is authorized by section 70-17-102, MCA. The Montana Supreme Court held that the easement was both alienable and apportionable. The question of whether an easement is alienable and apportionable is determined by the manner and terms of the document creating the easement. The court cited Mix for the proposition that the owner of a reserved easement may use the easement to the full extent of the right retained. The owners of the servient tenement argued that the easement holder should not be allowed to use the easement until the District Court determined whether the use of the easement would increase the burden on the servient tenement. The court cited Titeca v. State, 194 Mont. 209, 634 P.2d 1156 (1981), for the proposition that a use cannot be made of a right-of-way easement different than the use established at the time of the creation of the easement if that use will burden the servient tenement to a greater extent than was contemplated at the time the easement was created. Because the easement in Lindley had not been used, there was no increased burden. The Court refused to find that a proposed use would be inconsistent with the reserved easement on the basis of speculation.

In Ludwig v. Spoklie, 280 Mont. 315, 930 P.2d 56 (1996), the servient tenement was subject to two valid recorded easements. If an easement is nonexlusive, additional easements can lawfully be created in the same land. The first easement (senior easement) was a 200-foot transmission line easement granted to the Bonneville Power Administration. The second easement (junior easement) was a 60-foot reserved easement for road and utility purposes located within the boundaries of the senior easement. The junior easement holder entered into a land use agreement with the senior easement holder that established conditions with which the junior easement holder had to comply in developing the junior easement. The owners of the servient tenement sought to apply the permission terms of the land use agreement and enjoin the junior easement holder from developing a road without their permission. The court found that the owner of the servient tenement did not have standing to bring the action. The senior easement holder would

have the right to object to and preclude any use of the junior easement that unreasonably interfered with the senior easement. The only cause of action the servient tenement holder would have against the junior easement holder would have to be based upon the terms of the easement grant.

The Bolinger case contains an excellent discussion of the history and use of street and road easements for public utilities. The Montana Supreme Court concluded that the use of a county road easement for a municipal sewerline, with the consent of the county, did not require the consent of the adjoining property owners and could not be considered an invasion of the rights of the adjoining fee title owners. The Court declined to require the consent of adjoining property owners before sewerlines could be constructed under county roads because the same lines could be constructed under municipal streets without the consent of the adjoining property owners. This holding is easily harmonized with the general rule, expressed in 25 Am. Jur. 2d Easements and Licenses 90, that laying pipes for water, gas, or oil is not generally incidental to the ownership of a right-of-way. A right-of-way generally grants merely passage, and these type of installations constitute an additional burden on the servient tenement or a trespass. In Bolinger, because the county was the owner of the right-of-way and because it had consented to the sewerline, the Court determined that the servient tenement was not burdened by the additional public use. The Court, in analyzing utility placement within the roadway easement, determined that public highways, whether urban or rural, are designed as avenues of communication. Whether the transmission is of persons and property, or the transmission of intelligence, and whether the transmission is accomplished by old methods or new methods, they are all included in the public "highway easement" and impose no additional servitude on the land, provided the additional uses are not inconsistent with the reasonably safe and practical use of the highway in other usual and necessary modes. The additional uses may not impair the special easements of abutting landowners for purposes of access, light, and air. If a new use is an invasion of the rights of the abutting servient tenement owner that entitles the servient tenement owner to damages, the compensation must be paid before the new use is installed. If the new use is consented to by the easement holder and is not more burdensome than other public uses that are within possible contemplation at the time the right-of-way was created, there is no taking or damaging of the rights of the servient tenement. Sections 69-4-101 and 69-13-103, MCA, encourage multiple utility uses of the public rights-of-way.

The general rule is that the owner of an easement may not materially increase the burden of the servient tenement or impose a new or additional burden on the servient tenement. See Laden and 25 Am. Jur. 2d Easements and Licenses 81. The use of an easement includes those uses that are incidental or necessary to the reasonable and proper enjoyment of the easement but the additional uses are limited to those that burden the servient tenement as little as possible. An easement granted or reserved in general terms, without limitations as to its use, is one of unlimited reasonable use. See Laden and 25 Am. Jur. 2d Easements and Licenses 83. Whether a use is reasonable is a question of fact.

A case demonstrating the adaptation of easements to new technology is C/R TV, Inc. v. Shannondale, Inc., 273 Fed. 3d 104 (4th Cir. 1994). In that case, the Shannondale subdivision reserved a utility easement. Shannondale granted a utility an easement to install, erect, and maintain electric transmission and distribution poles and lines, electric service lines, and telephone wires. Shannondale later granted a easement for overhead and/or underground electric and communications systems and to permit installation of wires, cables, conduit, or other facilities to other companies and persons. The utility that was granted the easement licensed the use of its poles to other utilities on a nonexclusive basis. Shannondale then entered into an agreement with a cable television company to supply cable services to the subdivision and sought to prevent C/R TV from supplying cable services to the subdivision by using the utility's easement. The question presented to the court was whether the easement to construct poles and string electrical and telephone wires included the right to string television transmission cables. The federal court looked to the state law governing easements to answer the question. The court concluded that a two-part test was necessary to answer the question. The test was: (1) is the use sought to be included in the easement grant "substantially compatible" with the explicit grant; and (2) does the use sought substantially burden the servient tenement. The court found that there was no additional burden on the servient tenement by stringing another type of wire on the poles. The court concluded that easements give the holder the right "reasonably necessary" to carry out the purpose of the grant, including the right to utilize technological improvements.

The Shannondale holding is similar to the holding in Cenex Pipeline LLC. v. Fly Creek Angus, Inc., 292 Mont. 300, 971 P.2d 781 (1998), in which the Montana Supreme Court held that the provision in section 69-13-103, MCA, allowing a common carrier pipeline to include telegraph and telephone lines incidental to and designed for use only in connection with the operation of the pipeline, included the right to install a fiber optic line along with the pipeline. If the pipeline utility chose to lease a part of the fiber optic line already in place to another entity using fiber optic transmissions, there would be no additional burden on the servient tenement. Therefore, under that scenario, the servient tenement owner would not be entitled to additional compensation.

The discussions and holdings in all of the cited cases may be summarized into general concepts. The holder of an easement, whether obtained by purchase or condemnation, may make any necessary and reasonable uses of the easement for the purpose for which the easement is obtained. The easement holder may also make future uses of the easement that do not impose an additional burden on the servient tenement. If a future use or an additional use results in a greater burden on the servient tenement, the servient tenement owner is entitled to compensation or may bring a trespass action against the easement holder. The document or documents establishing an easement may contain provisions that require the easement holder to compensate the servient tenement owner for additional uses of the easement. If the documents establishing an easement do not contain that type of provision, then the servient tenement owner would have to demonstrate that the additional use imposed an additional burden on the servient tenement in order to receive compensation. Whether a use is reasonable and whether the use imposes an additional burden on the servient tenement are questions of fact.

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